IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.848 OF 1997

Arjun Gangappa Kore
Bandopant Chougule Niwas
Behind Mahavir Weigh Bridge
Sangli ... Appellant

V/s.

1. Nirmal Bhagchand Bothra
129, Mahavir Nagar, Vakharbhag
Sangli

2. The Oriental Insurance Company
Through its Divisional Manager,
Sangli

3. The Commissioner For
Workmen's Compensation, Labour Cour
Sangli ... Respondents

Mr.T.S. Ingale for Appellant
Mr.M.G. Barve for Respondent No.2
Respondent No.3 - formal party

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 26, 2004**

ORAL JUDGMENT:

. This Appeal arises from the judgment and order of the Commissioner for Workmen's Compensation, Sangli dated 3.12.1996. The Appellant, who is the injured workman, is aggrieved by the judgment and order which directs the opponents, namely, the respondent Nos.1 and 2 herein to deposit an amount of Rs.23363/- towards compensation, Rs.11681/- towards penalty and 9% simple interest on the amount of compensation from 19.8.1991 which is the date of the accident till deposit. A

further direction is given that after the deposit is made, an amount of Rs.25,000/- should be paid to the appellant and the remaining should be invested in a fixed deposit with a nationalised bank.

2. The appellant was working as a driver on a motor truck owned by Respondent No.1. While driving the vehicle on 19.8.1991, the appellant met with an accident as the front tyre on the right side of the truck burst. The appellant was grievously injured and was removed to a hospital at Karad. He had sustained a fracture of the shaft of the right femur besides various other fractures to both his legs and hands. The Appellant was treated in hospital as an in-patient and was then removed to the Civil Hospital, Sangli where he was operated upon and treated for a further period of 20 days. He was then discharged from the hospital. It appears that despite treatment, the appellant suffered pain in his right leg and, therefore, was again treated in a private hospital by the same Doctor who was treating him in the Civil Hospital, as an in patient. He underwent hospitalisation all over again and after a couple of more operations, the appellant was left with shortened right leg. He was not able to bend his leg nor could he bend the foot. Thus, he had become totally unfit for driving the vehicle. The appellant, therefore, filed an application under theWorkmen’s Compensation Act claiming

that he was suffering from a permanent total disability and therefore, was entitled to compensation under the Act. The appellant had stated that his monthly wages were Rs.1800/- and that he was 37 years of age. This application was filed since there was no response to the notice issued to the Respondents on 5.5.1993, claiming compensation.

3. Respondent Nos.1 and 2 filed separate written statements. Respondent No.1 denied that the appellant was his regular driver and that he was liable to make any payment. According to Respondent No.1, he had paid for the treatment of the appellant in the hospital at Karad and the Civil hospital at Sangli. The contention raised in the written statement filed by Respondent No.2 was that the appellant had not sustained permanent total disability and that he was not under treatment for six months as contended in the application.

4. Documentary and oral evidence was produced before the Court. The appellant examined himself and Dr.Aarwade, who was treating him. He also produced the certificate issued by Dr.Aarwade showing that he was suffering from disability of 25% on 21.7.1993. Evidence of the employer, that is, Respondent No.1 was also led. The appellant in his evidence has clearly stated about the injury that he has suffered and has also stated that

he underwent several operations and a steel rod had been inserted in his right leg. He was unable to bend either the right leg or the foot. He has also deposed that he suffers from pain in the right leg. The muscles in the right leg had become weak according to the appellant, thus preventing him from driving a vehicle. He has stated that he was an uneducated person and the only job that he was doing prior to the date of accident was that of driving a vehicle. He has further stated that his wages were Rs.1800/- per month and Rs.25/- per day was paid as daily allowance. The Doctor who was examined has denied the suggestion made to him in the cross examination that the appellant did not follow his instructions regarding physiotherapy as post-operative treatment. He has also denied the suggestion that the appellant had fully recovered from the injury on 13.7.1992. However, the Doctor has assessed the physical disability of the appellant at 25%. The employer in his evidence has denied that the appellant was his regular driver and has stated that the appellant was being paid Rs.30 per day.

5. The Commissioner for Workmen’s Compensation on the basis of the pleadings and the evidence on record has held that the workman being 39 years of age was entitled to compensation of Rs.23,363/-. He has also not accepted the contention of the respondents that the

appellant was not the employee of Respondent No.1. The Commissioner has held that the accident suffered by the Appellants arose out of and in the course of employment. However, the Commissioner has assessed the disability at 25%. This assessment has been made on the basis of the disability mentioned by the Doctor in the disability certificate. The Commissioner has considered the fact that the medical evidence on record shows that the loss of earning capacity which was assessed was the same as the physical disability being 25%. The Commissioner has awarded penalty of Rs.11,689/- and simple interest payable at 9% p.a. on the amount of compensation. It is this judgment and order which is being challenged in the appeal.

6. Mr.Ingale, learned Advocate for the Appellant, submits that the appeal raises a substantial question of law as the Commissioner has committed a grave error by not considering the loss of earning capacity of the appellant. He submits that the Commissioner ought to have considered the fact that the appellant had suffered total disability due to the accident and, therefore, while considering the compensation to be paid, the Commissioner was required to consider the loss of earning capacity which need not be confined to the extent of the disability stated in the medical certificate. He submits it has been proved that the

appellant is not capable of doing the work that he was performing earlier, namely, of driving the truck or any vehicle for that matter and therefore, it must be assumed that the loss of earning capacity is 100%. He places reliance on the judgments in *Pratap Narain Singh Deo v/s. Shrinivas Sabata & anr.*, **AIR 1976 SC 222**; *Sadashiv Krishna Adke v/s. Time Traders*, **1992 ACJ 711;** *Executive Engineer, Public Works Department & Anr. v/s. Bhimrao Manikrao Unhale,* **199 ACJ 1141** and *Mangru Palji v/s. M/s.Robinsons,* **1978 LAB.I.C. 1567** in support of his submission that Commissioner must assess the loss of earning capacity for himself and is not bound by the certificate issued by the Doctor showing that there was a disability of 25%.

7. Mr.Barve, learned Advocate for Respondent No.2, submits that under Order 41 Rule 33 of the Code of Civil Procedure, he is entitled to make a grievance about any finding of the Commissioner which is against the Respondents before the appeal Court, notwithstanding the fact that no cross appeal or cross objections have been filed. He submits that Respondent No.1 is aggrieved by the finding of the Commissioner that the respondents are liable to pay 9% interest on the compensation and penalty quantified at Rs.11681/-. He submits that the provisions of Order 41 Rule 33 are applicable even to an appeal filed under Workmen’s Compensation Act and,

therefore, he is entitled to submit that these findings of the Commissioner are wrong although no appeal has been filed against the judgment. Furthermore, according to the learned Advocate, the Commissioner has rightly come to the conclusion that there is a permanent partial disablement and, therefore, under section 4(1)(c)(ii) of the Act the disability has to be considered and assessed by a qualified medical practitioner and the Commissioner cannot override the assessment by the medical practitioner. He submits that under section 4(1)(c)(ii), it is only the qualified medical practitioner who can assess the loss of earning capacity of the injured workman since the injury suffered by him was a non-scheduled injury. Furthermore, according to the learned Advocate, the appeal does not raise substantial question of law and hence, the appeal should be dismissed. The learned advocate then submits that interest which could have been awarded to the appellant was only @6% p.a. as the amendments empowering the Commissioner to grant interest @12% p.a. was introduced only in 1995. He then submits that the liability of payment of penalty should not be foisted on the respondents as Respondent No.1 had in fact paid the medical expenses incurred on treating the appellant in both the hospital at Karad as well as the Civil Hospital. In these circumstances, the learned Advocate submits that the respondents are not liable to pay

either penalty or interest.

8. The first question to be decided now would be whether the submissions made by the advocate for the workman i.e., the appellant herein that there is a permanent total disability can be accepted. Total disablement has been defined under section 2(l) of the Workmen’s Compensation Act as follows:

> (l) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:
>
> Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more.

9. Therefore, any person who suffers an injury which incapacitates him from doing the work which he was performing at the time of the accident would result in total disablement. The proviso to this section stipulates that the permanent total disablement would be deemed to result in every injury specified in Part I of Schedule I or from any combination of those injuries specified in Part II. Thus, all scheduled injuries would lead to permanent total disablement depending on whether the disablement in respect of those injuries is

specified in Part I of Schedule I. Where it is a non-scheduled injury, the total disablement would have to be reckoned on the basis of whether the workman is incapacitated from doing the work that he was performing earlier. Under section 4 of the Act, compensation payable is specified depending on the injury which has resulted as a consequence of the accident. Subsection (1)(b) of section 4 is with respect to such injuries which result in permanent total disablement. Compensation in respect of such injuries which result in permanent total disablement is to be calculated at an amount equal to 50% of the monthly wage multiplied by the relevant factor or an amount of Rs.24,000/- whichever is more. Explanation II to that subsection stipulates that where the monthly wages for a workman exceeds Rs.1000/-, the wages for the purposes of determining the compensation would be taken as Rs.1000/-.

10. In the present case, the evidence on record indicates that the appellant was unable to perform the work that he was earlier doing. The appellant was employed as a driver. The accident has caused an injury to him which has resulted in fractures to his right leg and right foot and despite treatment these fractures have left him with a shortened right leg. This handicap has also resulted in decreasing the muscle power of the

limb as also its movement. The evidence on record demonstrates that the appellant is unable to bend either his right knee or the right foot. The right leg is essential for driving a vehicle as the right leg is used for accelerating the vehicle as well as for applying brakes. In such circumstances, when there is evidence on record to show that the workman was unable to carry out the work of driving the vehicle it obviously means that he had suffered an injury which resulted in complete disablement. The Supreme Court in the case of *Pratap Narain Singh Deo* (supra) considered the case of a workman who, as a result of an accident arising out of and in the course of employment, suffered a personal injury due to which his left arm above the elbow was required to amputated. The Apex Court has held that in view of the definition of total disablement, the work which was required to be performed by a carpenter could not be performed with only one hand. The appellant in that case was rendered unfit for carpentry work and, therefore, had suffered an injury which resulted in total disablement. In this view of the matter, in the present case also, the workman has suffered a non scheduled injury which has caused him total disablement as he is unable to drive a vehicle which was the work that he was doing prior to the accident. Similarly, in the case of *Sadashiv Krishna Adke* (supra), the workman, who was a coolie, sustained injuries in the course of

employment. He suffered from compound fractures and was hospitalised for some time. The Court held that a coolie's work required the limbs to be functioning properly and therefore, a person who moves on crutches, would obviously be unfit to do the work of a coolie. Similarly in the case of *Executive Engineer, P.W.D.* (supra), this Court considered the case of a driver of a roadroller who met with an accident arising out of and in the course of employment. The accident resulted in an injury which required amputation of the left arm above elbow joint. Although the medical board had assessed the disability at 45%, this Court placing reliance on the judgment in the case *Pratap Narain Singh Deo* (supra), held that the workman had been rendered permanently and totally disabled and therefore was entitled to compensation on that basis. In the case of *Mangru Palji* (supra), this Court has considered whether the Commissioner could assess what should be the liability to be imposed on the employer. The Court considered that the loss of earning capacity is co-extensive with the loss of physical capacity although the employer may pay the same wages as earlier, there may still be the case of loss of physical capacity.

11. Therefore, taking into consideration all these judgments, I am of the view that the appellant has suffered permanent total disablement as he is not

capable of performing the same work as he was doing prior to the accident. Compensation payable to him must therefore, be computed under section 4(1)(b) of the Act. The submission of the learned Advocate for the Respondent that compensation has rightly been computed on the basis of section 4(1)(c)(ii) is unsustainable as this provision is applicable only when there is partial disablement. The evidence on record clearly indicates that the injury suffered by the appellant rendered him totally disabled as defined under section 2(l) of the Act. That being so, the Commissioner ought to have computed the compensation under section 4(1)(b) and not 4(1)(c)(ii) as he has done.

12. The next issue which is required to be considered is whether the respondents can be permitted to make a grievance about certain findings in the impugned judgment which are against them. According to the Respondents, even without filing the cross appeal or objections, they are at liberty and have a right to raise such objections against which there is a finding againt them. The learned advocate for the Respondent No.2 submits that the finding of the Commissioner that the respondents are liable to pay 9% interest is without any basis since the accident occurred in the year 1991, when the interest which could be levied was only 6% simple interest whereas the Commissioner in the present

case has imposed 9% as interest. He further submits that no penalty ought to have been imposed since respondent No.1 had already paid for the medical expenses incurred during the hospitalisation of the appellant. In my view, the submission of Mr.Barve that he can raise these issues in the light of the provisions of Order 41 Rule 33 of C.P.C. cannot be accepted. The present appeal has been filed under section 30 of the Workmen's Compensation Act. Appeals lie before the High Court under this section in respect of certain orders passed by the Commissioner, provided a substantial question of law arises. The second proviso to this section stipulates that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner or in which the order of the Commissioner gives effect to an agreement entered into the by the parties. In the present case, there is no dispute that the respondent No.2 has unconditionally deposited the amount quantified by the Commissioner. In these circumstances, the submission of Mr.Barve cannot be accepted. Order 41 Rule 33 would come into play had the respondents deposited the amount without prejudice to their rights and contentions to raise such issues before this Court. Not having done so, I am of the view that the respondents cannot be permitted to urge these issues in the appeal.

13. A submission is also made by Mr.Barve that no question of law is involved in the present case and therefore, the appeal should be dismissed. This submission is also without any merit. The Commissioner has proceeded on the footing that the injury has caused only partial disablement to the appellant and not total disablement as claimed by the appellant. A substantial question of law would also include a case where the Commissioner does not consider the legal evidence on record and proceeds to decide a matter without there being any foundation in the pleading and or evidence. If the Commissioner records a finding unsupported by the

evidence on record, this would lead to a perversity finding and the appellant can always challenge such a finding as it raises a substantial question of law. Therefore, in my view, the appeal which has been filed does raise a substantial question of law.

14. The judgments in *Divisional Manager, United India Insurance v/s.Sahah Bahadur & anr.*, **1996 ACJ 558;** *Ved Prakash Garg v/s.Premi Devi & Ors.,* **1998 ACJ 1** and *Amar Nath Singh v/s. Continental Constructions Ltd.,* **2001 ACJ 643** cited by the learned Advocate for the Respondents have no relevance in the light of the view that I am taking in respect of Order 41 Rule 33 of Code of Civil Procedure. I, therefore, need not consider

these judgments.

15. In the result, the appeal is allowed. Compensation shall be paid to the appellant by the respondents calculated under section 4(1)(b). The total compensation payable by Respondent Nos.1 and 2 would be Rs.93,450/-. Penalty has been awarded to the appellant at 25% of the amount of compensation as there is some evidence to indicate that a part of the medical expenses were borne by Respondent No.1. The penalty shall be paid by Respondent No.1 at 25% of the compensation amount of Rs.93,450/- As regards interest, the same shall be paid @6% per annum on the enhanced amount of compensation by Respondent Nos.1 and 2. The amounts to be paid to the appellant will be adjusted against the compensation, penalty and interest already deposited with the Commissioner. All amounts must be deposited within eight weeks from today. The Commissioner shall pay the entire amount to the appellant immediately. The Commissioner need not retain any amount with him. The amount which has been invested earlier shall also be paid over the appellant.

16. Appeal stands disposed of in the above terms. No costs.

17. Mr.Barve, seeks leave to appeal to the Supreme

Court against this order. Mr.Ingale objects. Leave refused.